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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

OLGA ORTMANN, as an individual
and on behalf of all others similarly
situated.

Plaintiff:

v₃

NEW YORK LIFE INSURANCE COMPANY, a corporation; NEW YORK LIFE INSURANCE AND ANNUITY CORPORATION, a corporation; and DOES 1 through 20, inclusive.

Defendants.

| Case No. 3:07-CV-02506-WHA

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS' MOTION TO
STRIKE**

[FED. R. CIV. PROC. 12(f)]

Judge: Hon. William Alsup
Date: July 5, 2007
Time: 8:00 a.m.
Courtroom: 9, 19th Floor

1 **I. INTRODUCTION**

2 In this putative wage and hour class action, Plaintiff Olga Ortmann
 3 ("Plaintiff") alleges that she was employed as an "insurance agent" for Defendants
 4 New York Life Insurance Company and New York Life Insurance and Annuity
 5 Corporation ("Defendants"). (Complaint, ¶ 11.) In her second, third, and fourth
 6 causes of action, all of which allege violations of various provisions of the
 7 California Labor Code, Plaintiff seeks punitive and exemplary damages. As
 8 punitive damages are not an available remedy for these alleged violations of the
 9 Labor Code, these references to punitive damages should be stricken from the
 10 Complaint. In these same causes of action under the Labor Code, Plaintiff alleges
 11 that there is a four year statute of limitations when, in fact, a three year statute of
 12 limitations applies. These improper references to a four year statute of limitations
 13 should also be stricken.

14 In addition, in her fifth cause of action, Plaintiff seeks to recover civil
 15 penalties pursuant to California Labor Code § 558. As there is no private right of
 16 action under Labor Code § 558, this claim for relief should be stricken. Finally, in
 17 Plaintiff's twelfth cause of action under California's Unfair Competition Law
 18 ("UCL"), Plaintiff requests that Defendants be ordered to disgorge their profits.
 19 Since restitution is the only monetary remedy available under the UCL, the request
 20 for disgorgement of profits should be stricken.

21 **II. LEGAL ARGUMENT**

22 **A. Plaintiff Cannot Seek The Recovery Of Punitive Damages In The
 23 Second, Third, And Fourth Causes of Action Which Are Based On
Violations Of The California Labor Code.**

24 In her second cause of action for failure to pay minimum wages under
 25 Section 1194 of the California Labor Code, third cause of action for failure to
 26 overtime under Section 1194 of the Labor Code, and fourth cause of action for
 27 failure to indemnify for expenses and losses and illegal deductions from wages
 28 under Labor Code §§ 226 and 2802, Plaintiff seeks the recovery of punitive and

1 exemplary damages. (Complaint, ¶¶ 29, 36, 43). Punitive damages are not an
 2 available remedy for these causes of action.

3 Where a statute creates new rights and obligations not previously existing in
 4 the common law, the express statutory remedy is deemed to be the exclusive
 5 remedy available for statutory violations, unless the remedies are inadequate.

6 *Turnbull & Turnbull v. ARA Transportation Inc.*, 219 Cal. App. 3d 811 (1990); *De*
 7 *Anza Santa Cruz Mobile Estates Homeowners Ass'n v. De Anza Santa Cruz Mobile*
 8 *Estates*, 94 Cal. App. 4th 890, 912 (2001). The claims that Plaintiff bring under the
 9 Labor Code—based on the obligations to pay minimum wage, to pay overtime, to
 10 provide accurate wage statements, to indemnify and reimburse for business
 11 expenses —did not exist at common law, but rather are liabilities created by statute.
 12 See *Aubry v. Goldhor*, 201 Cal. App. 3d 399, 404 (1988).¹

13 The Legislature has established a comprehensive set of rights and remedies
 14 governing the compensation of workers in California in the Labor Code. In so
 15 doing, the Legislature set forth the remedies, including civil and criminal penalties,
 16 that it deemed appropriate for violations of various provisions of the Labor Code.
 17 For example, Plaintiff can seek, and is seeking, the penalty of liquidated damages
 18 for failure to pay minimum wage under Labor Code § 1194.2, waiting time
 19 penalties under Labor Code § 203 for the failure to timely pay wages, and penalties
 20 for failure to provide accurate wage statements under Labor Code § 226. In
 21 addition, the Labor Code sets forth a comprehensive scheme of criminal and civil
 22 enforcement, which is augmented by the Labor Code Private Attorneys General Act
 23 of 2004, Labor Code § 2698 *et seq.* By setting forth specific penalty provisions
 24 throughout the Labor Code, it can be inferred that the Legislature intended to
 25 exclude other remedies. Indeed, Plaintiff expressly seeks penalties under each of
 26 her second, third and fourth causes of action. See Complaint ¶¶ 30, 37, 44.

27
 28 ¹ Superceded by statute on other grounds, as stated in: *Bell v. Farmers Ins. Exchange* 135 Cal.
 App. 4th 1138, 1147-1148 (2006)

1 Consequently, the statutory remedies set forth in the California Labor Code are the
 2 exclusive remedies for the causes of action brought by Plaintiff under the Labor
 3 Code.

4 The “Legislature intend[s that] the statutory penalty set forth in [a statute] . . .
 5 be the exclusive penalty in a suit to enforce the provisions of [that statute].” *De*
Anza, 94 Cal. App. 4th at 912. This interpretation comports with the due process
 6 requirement that employers have fair notice of the penalty available for particular
 7 conduct. *Id.* at 912 (*citing BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574
 8 (1996)) (“Elementary notions of fairness enshrined in our constitutional
 9 jurisprudence dictate that a person receive fair notice not only of the conduct that
 10 will subject him [or her] to punishment but also of the severity of the penalty that a
 11 State may impose.”). This interpretation also avoids the possibility of double
 12 penalties for the same conduct. As *De Anza* held, “a plaintiff cannot recover both
 13 punitive damages and statutory penalties, as this would constitute a prohibited
 14 double penalty for the same act.” *Id.* Here, Plaintiff seeks penalties under Labor
 15 Code §§ 203, 226 and 558 in her second, third, and fourth causes of action (*see*
 16 Complaint, ¶¶ 30, 37, 44), in addition to punitive damages, for the very same
 17 alleged Labor Code violations.

18 Federal courts have specifically applied the exclusive remedy doctrine to the
 19 Labor Code. In *Green v. Party City Corporation*, 2002 U.S. Dist. LEXIS 7750
 20 (C.D. Cal. Apr. 9, 2002), the plaintiff alleged three causes of action for overtime
 21 compensation: 1) violation of Labor Code section 1194, 2) violation of the UCL,
 22 and 3) conversion. *Id.* at *1. The plaintiff also sought punitive damages. *Id.* at
 23 *14. The court held that “the duty to pay overtime is a duty created by statute
 24 rather than one that existed at common law” and “the Labor Code provides a
 25 detailed remedial scheme for violation of its provisions.” *Id.* at *13-14. As such,
 26 the “plaintiff [could] not advance a claim for punitive damages.” *Id.* at 15.
 27 Similarly, in *Czechowski v. Tandy Corp.*, 731 F. Supp. 406, 410 (N.D. Cal. 1990),

1 the plaintiffs alleged various violations of the Labor Code and sought both penalties
 2 and punitive damages. The court held that “[t]he Legislature's provision of such
 3 statutory penalties preclude[d] an award of punitive damages.” *Id.* at 410. Most
 4 recently, in *Oprychal v. New York Life Ins. Co.*, Case No. CV 07-518 VBF, pg. 2
 5 (C.D. Cal. April 13, 2007),² the District Court granted Defendants' motion to strike
 6 the plaintiff's request for punitive damages for similar violations of various
 7 provisions of the California Labor Code, finding that the plaintiff's “requests for
 8 punitive damages are completely without support in statutory or case law.”³

9 Like the plaintiffs in *Green*, *Czechowski*, and *Oprychal*, Plaintiff here
 10 impermissibly seeks punitive damages for her Labor Code claims. Like the courts
 11 in *Green*, *Czechowski*, and *Oprychal*, this Court should hold that punitive damages
 12 are not recoverable because the statutory remedies provided for in the Labor Code
 13 are exclusive and do not permit the recovery of punitive damages. All references to
 14 the recovery of punitive damages should be stricken from the second, third, and
 15 fourth causes of action.

16 B. A Four-Year Statute of Limitations Does Not Apply To
 17 Plaintiff's Second, Third, And Fourth Causes Of Action
 18 Under The California Labor Code.

19 In her second cause of action for failure to pay minimum wages, third cause
 20 of action for failure to pay overtime, and fourth cause of action for alleged unlawful
 21 deductions Plaintiff alleges that a four year statute of limitations applies.
 22 (Complaint, ¶¶ 27, 34, 41). These allegations should be stricken as a four year
 23 statute of limitation does not apply to these claims.

24 Specifically, in her second and third causes of action, Plaintiff claims that
 25 Defendants violated Labor Code § 1194 which provides, in relevant part, that “an
 26 employee receiving less than the legal minimum wage or the legal overtime

27 ² Attached hereto as Exhibit A.

28 ³ Defendants are concurrently moving to dismiss, stay, or transfer the present action given the
 pendency of the *Oprychal* issue, under the “first-to-file” rule.

1 compensation . . . is entitled to recover in a civil action the unpaid balance of the
 2 full amount of this minimum wage or overtime compensation.” Labor Code
 3 § 1194. A three-year statute of limitations governs claims brought pursuant to
 4 Labor Code § 1194. *See Aubry v. Goldhor*, 201 Cal. App. 3d 399, 404 (1988) (“the
 5 three-year statute of limitations governs . . . the cause of action for unpaid overtime
 6 compensation”); *Janik v. Rudy, Exelrod & Zieff*, 119 Cal. App. 4th 930, 934 (2004)
 7 (a three-year statute of limitations applied to a Labor Code § 1194 claim).
 8 Paragraphs 27 and 34 of the Complaint, which allege that Plaintiff is entitled to
 9 recover minimum wages and overtime for hours worked during the four years
 10 preceding the filing of the Complaint, should therefore be stricken.

11 In addition, in her fourth cause of action, Plaintiff claims that Defendants
 12 violated Labor Code § 2802 because allegedly they did not indemnify or reimburse
 13 Plaintiff for all expenditures or losses incurred in direct consequence of the
 14 discharge of her duties. A claim under Labor Code § 2802 is subject to the three-
 15 year statute of limitations set forth in Code of Civil Procedure § 338(a) as a
 16 statutory obligation. Therefore, the allegation in paragraph 41 in the fourth cause of
 17 action which refers to four years prior to the filing of the Complaint should be
 18 stricken.

19 C. Plaintiff’s Request For Penalties Pursuant To Labor Code
 20 § 558 Should be Stricken Because There Is No Private Right
 21 Of Action To Seek Penalties Under Section 558.

22 In her fifth cause of action, Plaintiff alleges that she is entitled to penalties
 23 pursuant to Labor Code § 558 for Defendants’ alleged failure to provide meal
 24 breaks. (Complaint, ¶¶ 6, 48). Plaintiff’s request for penalties should be stricken
 25 as there is no private right of action to seek such relief under § 558.

26 Under California law, “[a]doption of a regulatory statute does not
 27 automatically create a private right to sue for damages resulting from violations of
 28 the statute.” *Vikco Ins. Services, Inc. v. Ohio Indem. Co.*, 70 Cal. App. 4th 55, 62-

1 63 (1999). Rather,

2 a private right of action exists only if the language of the
 3 statute or its legislative history clearly indicates the
 4 Legislature intended to create such a right to sue for
 5 damages. If the Legislature intends to create a private
 6 cause of action, [California courts] generally assume it
 7 will do so directly in clear understandable, unmistakable
 8 terms.

9
 10 *Id.* (citations, quotations, alterations omitted).

11 Section 558 imposes various penalties for “[a]ny employer or other person
 12 acting on behalf of an employer who violates, or causes to be violated, a section of
 13 [Chapter One, Part Two of the Labor Code] or any provision regulating hours and
 14 days of work in any order of the Industrial Welfare Commission . . . ”. Labor Code
 15 § 558. The plain language of § 558 does not “clearly and unmistakably give
 16 employees the right to sue under section 558.” *Ruiz v. Paladin Group, Inc.*, 2003
 17 WL 22992077, *2 (C.D. Cal. Sept. 29, 2003).

18 The structure of Section 558 and a comparison with other provisions of the
 19 Labor Code further confirm that employees do not have a private right of action.
 20 As noted by the *Ruiz* court, “[p]art (a) provides the remedies for a violation of
 21 certain wage and hour provisions, while part (b) sets forth the procedure for
 22 enforcement of that section through the Labor Commissioner.” *Id.* at *2 (emphasis
 23 added). Moreover, where the legislature has intended to create a private right of
 24 action, it has done so in clear and unmistakable language. *See* Labor Code § 1194
 25 (“any employee receiving less than the legal minimum wage or the legal overtime
 26 compensation . . . is entitled to recover in a civil action the unpaid balance . . . ”)
 27 (emphasis added). In short, Section 558’s “comprehensive administrative scheme,
 28 together with the absence of reference to a private right of action, strongly suggests

1 that the Legislature did not intend to create a private right of action" *Ruiz*,
 2 2003 WL 22992077 at *2. *See also Caliber Bodyworks, Inc. v. Superior Court*, 134
 3 Cal. App. 4th 365, 377-78 (2005) (discussing "civil penalties" under the Labor
 4 Code which were enforceable only by California's labor law enforcement
 5 agencies). Thus, Plaintiff's claim for penalties pursuant to California Labor Code §
 6 558 should be stricken.

7 **D. Plaintiff Cannot Seek Disgorgement of Profits Under The**
 8 **UCL.**

9 Plaintiff's twelfth cause of action is brought pursuant to the UCL. In support
 10 of her claims, Plaintiff alleges that Defendants' alleged violations of the Labor
 11 Code and various other regulations, constitute "unfair and unlawful business
 12 practices" under the UCL. (Complaint, ¶ 83). Plaintiff seeks recovery of
 13 "disgorged profits" from the alleged unlawful business practices of Defendants.
 14 (Complaint, ¶ 85, Prayer for Relief, ¶ 4).

15 Disgorgement of profits is not available to a private litigant under the UCL.
 16 State and federal courts have repeatedly held that the UCL limits a private
 17 plaintiff's monetary remedy to restitution. *See Cortez v. Purolator Air Filtration*
Prods. Co., 23 Cal. 4th 163, 176 (2000); *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 950
 18 (2002) (*quoting Cel-Tech Comms., Inc. v. L.A. Cellular Tele. Co.*, 20 Cal. 4th 163,
 19 179 (1999)); *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1146
 20 (2003) (*quoting Kraus v. Trinity Mgm't Serv's Inc.*, 23 Cal. 4th 116, 129 (2000)).

21 The California Supreme Court has unequivocally held that "disgorgement . . .
 22 is not an authorized remedy in an individual action under the UCL." *Korea Supply*
 23 *Co.*, 29 Cal. 4th at 1140. In *Korea Supply Co.*, the plaintiff sought the disgorgement
 24 of profits acquired by the defendant through its allegedly unfair business practices.
 25 *Id.* at 1142. The California Supreme Court reaffirmed the distinction that it had
 26 previously made between disgorgement and restitution, in that "disgorgement" is a
 27 broader remedy than restitution. *Id.* at 1144-45. The Court held that, while
 28

1 restitution was an available remedy under the UCL, disgorgement of money
 2 obtained through an unfair business practice is an available remedy in a
 3 representative and an individual UCL action ***only to the extent that it constitutes***
 4 ***restitution.*** *Id.* at 1145. Several courts have subsequently held that disgorgement
 5 of profits is also not available in a class action under the UCL. *See e.g., Madrid v.*
 6 *Perot Systems Corp.*, 130 Cal. App. 4th 440, 459, 461 (2005); *Feitelberg v. Credit*
 7 *Suisse First Boston, LLC*, 134 Cal. App. 4th 997, 1018 (2005). As such, although
 8 the unpaid wages and deductions may be recoverable under the UCL as restitution,
 9 disgorged profits are not recoverable. In *Oprychal v. New York Life Ins. Co.*, Case
 10 No. CV 07-518 VBF, the District Court granted Defendants' request to strike the
 11 Plaintiff's request for disgorgement of profits in his UCL claim. Therefore,
 12 Plaintiff's requests for "disgorged profits" should be stricken from her UCL claim
 13 and the Complaint.

14 **III. CONCLUSION**

15 For the foregoing reasons, Defendants request that the Court grant their
 16 motion to strike.

17 Dated: May 24, 2007

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